Supreme Court, U.S.
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No. 00-287

In the Supreme Court of the United States

CHARLES R. ROBINSON, IV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred in sentencing petitioner to 100 years' imprisonment for drug offenses in the absence of jury findings on the quantity of drugs involved in the petitioner's offenses or his relevant conduct.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 215 F.3d 1331 (Table). A prior opinion of the court of appeals (Pet. App. 33a-39a) is reported at 164 F.3d 1068. The opinion of the district court following the first appeal (Pet. App. 7a-22a) is reported at 76 F. Supp. 2d 941. The original opinion of the district court (Pet. App. 40a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. The petition for a writ of certiorari was

filed on August 21, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on two counts of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 100 years' imprisonment, to be followed by five years of supervised release. Pet. App. 54a-63a. The court of appeals affirmed petitioner's convictions but vacated his sentence. *Id.* at 33a-39a. On remand, the district court resentenced petitioner to 100 years' imprisonment, to be followed by five years of supervised release. *Id.* at 7a-32a. The court of appeals affirmed. *Id.* at 1a-6a.

1. Petitioner was a distributor of crack cocaine in Springfield, Illinois. On October 27, 1996, police officers found 27.6 grams of powder cocaine and 16.4 grams of crack cocaine in petitioner's car. Petitioner was also carrying 0.4 grams of crack cocaine in his pants pocket. Presentence Investigation Report (PSR) 6-7. On November 12, 1996, a confidential informant purchased 2.1 grams of crack cocaine from petitioner and an associate. PSR 7-8. Later that day, police officers found 14 grams of crack cocaine in a bag that petitioner discarded from his car in an area outside a motel where he had tried to elude the officers. PSR 8-9.

2. A grand jury returned a three-count indictment against petitioner. Count 1 charged that petitioner "possessed a controlled substance, namely approximately 16.8 grams of a mixture and substance containing cocaine base ('crack') and approximately 27.6

grams of a mixture and substance containing cocaine, both being Schedule II controlled substances, with the intent to distribute them" on October 27, 1996; Count 2 charged that he "distributed approximately 2.1 grams of a mixture and substance containing cocaine base ('crack'), a Schedule II controlled substance" on November 12, 1996; and Count 3 charged that he "possessed a controlled substance, namely approximately 14 grams of a mixture and substance containing cocaine base ('crack'), a Schedule II controlled substance, with the intent to distribute it" on November 12, 1996. C.A. App. 22-23. Although the indictment specified the type and amount of narcotics in each count, petitioner did not request an instruction at trial requiring the jury to find the quantity of drugs involved in his offenses, and the court gave no such instruction. The jury found petitioner guilty on all three counts.

At sentencing, the district court determined under the relevant conduct provision of Sentencing Guidelines (Guidelines) § 1B1.3(a)(2) that petitioner was responsible for 5,246.6 grams of crack cocaine and 27.6 grams of cocaine, resulting in a base offense level of 38.[1] Pet. App. 35a-36a; PSR 9, 12. The court found "by a preponderance of the evidence that the drug involved was 'crack.'" Pet. App. 51a. After making other adjustments to the offense level, the court determined that petitioner's Guidelines' range was life imprisonment, based upon a total offense level of 43 and a

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[1] Guidelines § 1B1.3(a)(2) required that petitioner's base offense level be determined on the basis of "all acts and omissions" that "were part of the same course of conduct or common scheme or plan as the offense of conviction."

placement in criminal history category VI. *Id.* at 34a, 52a, 62a; PSR 12-13, 19.

Based on the quantities of drugs involved in the offenses, the district court also determined that the statutory maximum terms of imprisonment were 40 years on Counts 1 and 3 under 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998) and 20 years on Count 2 under 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998). Pet. App. 34a, 52a; PSR 29. Pursuant to Guidelines §§ 5G1.1(c) and 5G1.2(d), the district court sentenced petitioner to consecutive terms of 40 years' imprisonment on Count 1, 20 years' imprisonment on Count 2, and 40 years' imprisonment on Count 3. Pet. App. 34a, 52a, 56a.

2. The court of appeals affirmed petitioner's convictions but vacated his sentence. Pet. App. 33a-39a. The court concluded that the statements of one of petitioner's underlings, Gina Loonsfoot, were not sufficiently reliable to support the district court's inclusion of 5,103 grams of crack cocaine in its determination of petitioner's relevant conduct under Guidelines § 1B1.3(a)(2). Pet. App. 36a-38a. The court found that petitioner's other claims were "meritless," noting that "the testimony at trial clearly established that [petitioner] distributed crack, not some less devastating species of cocaine." *Id.* at 39a n.1. The court accordingly remanded for resentencing.

3. On remand, the district court again sentenced petitioner to 100 years' imprisonment. Pet. App. 7a-32a. Based on the testimony of three witnesses, the court found that petitioner was responsible under the relevant conduct provision of Guidelines § 1B1.3(a)(2) for at least 500 grams of crack cocaine, resulting in a base offense level of 36. Pet. App. 14a-19a. After making other adjustments to the offense level, the

court determined that petitioner's Guidelines range was life imprisonment, based a total offense level of 43 and a placement in criminal history category VI. *Id.* at 20a-21a, 31a. Pursuant to Guidelines §§ 5G1.1(c) and 5G1.2(d), the court again sentenced petitioner to consecutive statutory maximum terms of 40 years' imprisonment on Count 1, 20 years' imprisonment on Count 2, and 40 years' imprisonment on Count 3. Pet. App. 21a-22a, 25a.

4. The court of appeals affirmed. Pet. App. 1a-6a. It concluded that the district court's calculation of the quantity of drugs included in petitioner's relevant conduct was not clearly erroneous. *Id.* at 4a-5a. The court also decided that "at the resentencing proceeding the district court properly refused to reconsider issues involving the enhancements [to petitioner's offense level] * * * as well as the identity of the drug as crack cocaine rather than some other form of cocaine." *Id.* at 6a.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the district court, rather than the jury, determined the type and quantity of drugs involved in his relevant conduct under the Sentencing Guidelines. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

a. Contrary to petitioner's contention, there was no error under *Apprendi* in the district court's determination of the type and quantity of drugs for which

petitioner was responsible under the relevant conduct provision of the Sentencing Guidelines. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards* v. *United States*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guidelines range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the

Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because the sentence determined under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, Guidelines § 5G1.1(a); *Edwards* v. *United States*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"), *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See, *e.g.*, *United States* v. *Angle*, No. 96-4662, 2000 WL 1515159, at *10 (4th Cir. Oct. 12, 2000) (after *Apprendi*, "the judge may still determine the amount of drugs by a preponderance of the evidence for the purposes of calculating the offense level and relevant conduct under the United States Sentencing Guidelines"); *United States* v. *Doggett*, No. 99-50380, 2000 WL 1481160, at * 5 (5th Cir. Oct. 6, 2000) ("To the extent that Doggett argues *Apprendi* prohibits the trial court from determining the amount of drugs for relevant conduct purposes under the Sentencing Guidelines, this argument is rejected.").

b. Petitioner mistakenly states (Pet. 6) that his statutory maximum sentences, unlike that of the defendant in *Apprendi*, were "not * * * increased" in this case. Based on its findings that the quantities of drugs involved in the offenses were the amounts charged in the indictment, the district court sentenced petitioner to consecutive statutory maximum terms of 40 years' imprisonment on Count 1, 20 years' imprisonment on Count 2, and 40 years' imprisonment on Count 3.[2] Pet. App. 21a-22a, 25a.

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[2] The district court had statutory authority to run those terms consecutively, for a cumulative term of 100 years' imprisonment. See 18 U.S.C. 3584. The Guidelines also address the circumstances

There was no constitutional error under *Apprendi* in the 20-year sentence imposed under 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998) on Count 2. Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years" for a defendant who has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance. Because petitioner's offense involved cocaine base,[3] a Schedule II controlled substance (see 21 U.S.C. 812(c) (Sch. II(a))), petitioner was subject to a 20-year maximum term on Count 2 under Section 841(b)(1)(C), without regard to the specific quantity of cocaine base involved in the offense.

The same conclusion is not true with respect to petitioner's 40-year sentences on Counts 1 and 3. Those sentences are authorized by 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998), which provides that where the offense involves a particular threshold quantity of drugs—here, five grams or more of cocaine base—the defendant shall be sentenced to "a term of imprisonment which may not be less than 5 years and not more than 40 years[.]" The 40-year sentences on Counts 1 and 3, however, exceed the 20-year statutory maximum term prescribed under Section 841(b)(1)(C) for offenses involving Schedule II controlled substances without a

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under which sentences on multiple counts should be run consecutively to achieve the total punishment determined under the Guidelines. Guidelines § 5G1.2. The constitutionality of a sentence under *Apprendi*, however, turns on whether the sentence on a particular count exceeds the prescribed statutory maximum. 120 S. Ct. at 2354.

[3] Count 2 charged that petitioner distributed 2.1 grams of cocaine base. The district court's instructions on Count 2 required the jury to find that "[petitioner] distributed cocaine base ('crack')" as an element of the offense. Jury Instructions 24.

showing as to quantity.[4] The 40-year sentences on Counts 1 and 3 thus depended on an increase in the statutory maximum term based on the district court's findings at sentencing that the offenses involved more than five grams of cocaine base. Imposition of sentences in excess of 20 years on Counts 1 and 3 on the basis of the drug quantity determinations made by the court was error under this Court's decision in *Apprendi*.

Petitioner, however, did not raise this constitutional claim in the district court, the court of appeals, or this Court. The claim therefore may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Nordby*, No. 99-10191, 2000 WL 1277211, at *6 (9th Cir. Sept. 11, 2000); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000). The error in imposing 40-year sentences on Counts 1 and 3 based on quantity findings made by the court at sentencing was "plain," in that it was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *United States* v.

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[4] Both cocaine and cocaine base are Schedule II controlled substances. See 21 U.S.C. 812(c) (Sch. II(a)). Count 1 charged that petitioner possessed with intent to distribute 16.8 grams of cocaine base and 27.6 grams of cocaine, and Count 3 charged that petitioner possessed with intent to distribute 14 grams of cocaine base. The district court's instructions on Count 1 and 3 required the jury to find that "[petitioner] knowingly or intentionally possessed a controlled substance, namely cocaine base ('crack') or cocaine" as an element of the offenses. Jury Instructions 21. The district court also instructed the jury that "[t]he government need not prove the amount of controlled substance involved in any count charged in the indictment." *Id.* at 25.

Nordby, 2000 WL 1277211, at *6. A showing that the district court committed "plain error" in sentencing petitioner will not entitle him to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). Under the circumstances, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000).

Respectfully submitted.

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